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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/817,303	04/02/2004	Joseph E. Owensby	031456/271433	1854
826	7590	06/29/2007		
ALSTON & BIRD LLP BANK OF AMERICA PLAZA 101 SOUTH TRYON STREET, SUITE 4000 CHARLOTTE, NC 28280-4000			EXAMINER LEFF, STEVEN N	
			ART UNIT 1761	PAPER NUMBER
			MAIL DATE 06/29/2007	DELIVERY MODE PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/817,303	Applicant(s) OWENSBY, JOSEPH E.	
	Examiner Steven Leff	Art Unit 1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on May 15th, 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-19 is/are pending in the application.
 4a) Of the above claim(s) 15-19 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-14 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 09 June 2005 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
 a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date: _____ |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>4/2/04, 8/12/05</u> | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Election/Restrictions

Applicant's election of claims 1-14 in the reply filed on May 15th, 2007 is acknowledged. Because applicant did not distinctly and specifically point out the supposed errors in the restriction requirement, the election has been treated as an election without traverse (MPEP § 818.03(a)).

Claims 15-19 are withdrawn from further consideration pursuant to 37 CFR 1.142(b), as being drawn to a nonelected invention, there being no allowable generic or linking claim. Applicant timely traversed the restriction (election) requirement in the reply filed on May 15th, 2007.

Claim Objections

- Claim 9 is objected to because of the following informalities: The claim lacks a period. Appropriate correction is required.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

- Claims 1-14 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.
 - The phrase "substantially transparent" in claim 1 is rejected as it is unclear as to how something may be "substantially transparent", and to what extent this includes if not completely transparent.
 - The phrase "trough-like" in claim 3 is rejected, as it is a relative term, which renders the claim indefinite. The term "trough-like" is not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention. It is unclear as to what is encompassed by the phrase "trough-like"; it is unclear as to what degree of difference is encompassed by this phrase, if not a "trough".
 - The phrase "generally rectangular" in claim 5 is rejected as it is unclear as to how something may be "generally rectangular", and to what extent this includes if not "rectangular".

- The phrase "said seal" in claims 6 and 7 lacks antecedent basis.
- Claim 14 recites the limitation "the atmosphere" of claim 1. There is insufficient antecedent basis for this limitation in the claim. Claim 1 describes an "a container for packaging perishable food items..." The subsequent claim refers to "the atmosphere" of claim 1 however claim 1 does not define an atmosphere. Claim 1 defines a container.
- The phrase "manipulated to optimize storage conditions" in claim 14 is rejected, as it is a relative term, which renders the claim indefinite. The phrase "manipulated to optimize storage conditions" is not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention. It is unclear as to what is encompassed by the phrase "manipulated to optimize storage conditions"; it is unclear as to what degree of difference is encompassed by this phrase, if not a "manipulated to optimize storage conditions".

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

- Claims 1-6 are rejected under 35 U.S.C. 102(b) as being anticipated by *Mixon* (3671272).

With respect to claims 1-6, *Mixon* teaches a container for packaging perishable food items which comprises a tubular body portion having two ends (fig. 3), where the tubular body portion has a cross-section suitable for holding a perishable food item (fig. 1), wherein at least a portion of the tubular body is substantially transparent (col. 3 line 10), one end of the body portion is closed and the other end of the body portion has an open mouth (fig. 3), where the open mouth is adapted to be sealed (col. 3 line 19+). *Mixon* further teach that the cross-section of the container tubular body portion is shaped to have a flat bottom, where flat bottom has an undulating profile at each side forming a trough-like area (col. 6 line 13+).

Alternatively, *Mixon* teaches that the cross-section of the container body portion is cylindrical (col. 3 line 27+, fig. 9), or generally rectangular (fig. 5) and that the open end is sealable by a heat sealable film (col. 3 line 20+).

- Claims 1-3, 5, and 10-12 are rejected under 35 U.S.C. 102(b) as being anticipated by Daenen et al. (Des. 279253)

With respect to claims 1-3, 5, 10-12, Daenen et al. teach a container for packaging perishable food items which comprises a tubular body portion having two ends (figs. 1-14), where the tubular body portion has a cross-section suitable for holding a perishable food item, wherein at least a portion of the tubular body is substantially transparent (pg. 1, col. 2, line 31+), one end of the body portion is closed and the other end of the body portion has an open mouth (figs. 1-14), where the open mouth is adapted to be sealed (figs. 1-14). Daenen et al. further teach that the cross-section of the container tubular body portion is shaped to have a flat bottom, where flat bottom has an undulating profile at each side forming a trough-like area (figs 1-14).

Alternatively, Daenen et al. further teach that the cross-section of the container body portion is generally rectangular (figs. 1-14), that a lip projects radially from the periphery of the mouth opening (figs. 1-14), that the container includes indicia (pg. 1 col. 2 line 29) and that at least a portion of the tubular body is opaque (pg. 1, col. 2, line 30+).

- Claims 1, 4, 7-9, and 12 are rejected under 35 U.S.C. 102(b) as being anticipated by Callery (2904205).

With respect to claims 1, 4, 7-9, and 12, Callery teaches a container for packaging perishable food items which comprises a tubular body portion having two ends (fig. 4), where the tubular body portion has a cross-section suitable for holding a perishable food item (fig. 4), wherein at least a portion of the tubular body is substantially transparent (col. 1 line 42), one end of the body portion is closed and the other end of the body portion has an open mouth (fig. 4), where the open mouth is adapted to be sealed (fig. 2).

Callery further teaches that the cross-section of the body portion is cylindrical (figs 1-4), and that the container is sealed with an end cap (col. 2 line 66+), where the end cap is attached to the body of the container by friction-fit or a tack weld using screw threads (col. 2 line 66+), and that a lip projects radially from the periphery of the mouth opening (figs. 1-4).

- Claims 1-3, 5-8, and 11-14 are rejected under 35 U.S.C. 102(b) as being anticipated by Garwood (5514392).

With respect to claims 1-3, 5-8, and 11-14, Garwood teaches a container for packaging perishable food items which comprises a tubular body portion having two ends (fig. 1-12), where the tubular body portion has a cross-section suitable for holding a perishable food item (fig. 1-12), wherein at least a portion of the tubular body is substantially transparent (col. 4 line 13), one end of the body portion is closed and the other end of the body portion has an open mouth (figs. 1-4), where the open mouth is adapted to be sealed (col. 4 line 33+). Garwood further teaches that the cross-section of the container tubular body portion is shaped to have a flat bottom, where flat bottom has an undulating profile at each side forming a trough-like area (col. 3 line 55+).

Garwood continues by teaching that the cross-section of the body portion is generally rectangular (figs 1-4), and that the container is sealed either by a heat sealable film (col. 8 line 10+) or by an end cap (col. 7 line 35+), where the end cap is attached to the body of the container by friction-fit or a tack weld (col. 7 line 35+), and that a lip projects radially from the periphery of the mouth opening (figs. 1-2). In addition, at least a portion of the tubular body is opaque (col. 4 line 21+), the interior of the tubular body portion is coated with an anti-fogging agent (col. 3 line 32+), and that the atmosphere within the container is manipulated to optimize storing conditions (col. 4 line 1+).

- Claims 1-2, 4-6, 10-11, and 14 are rejected under 35 U.S.C. 102(b) as being anticipated by Jarvis (4112124).

With respect to claims 1-2, 4-6, 10-11, and 14, Jarvis teaches a container for packaging perishable food items which comprises a tubular body portion having two ends (figs. 5a-5d), where the tubular body portion has a cross-section suitable for holding a perishable food item (abstract), wherein at least a portion of the tubular body is substantially transparent (col. 2 line 64), one end of the body portion is closed and the other end of the body portion has an open mouth (figs. 5a-5d), where the open mouth is adapted to be sealed (col. 10 line 10).

Jarvis continues by teaching that the cross-section of the body portion is shaped to have a flat bottom (col. 10 line 21), is cylindrical (fig. 6), or generally rectangular (fig. 6), includes indicia (col. 11 line 64, fig. 6) and that the container is sealed by a heat sealable film (col. 10 line 22+). In addition Jarvis teaches that at least a portion of the tubular body is opaque (col. 11 line 65, fig. 6), and that the atmosphere within the container is manipulated to optimize storing conditions (col. 10 line 3+).

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Steven Leff whose telephone number is (571) 272-6527. The examiner can normally be reached on Mon-Fri 8:30 - 5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571)272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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**KEITH HENDRICKS
PRIMARY EXAMINER**